ORIGINAL COPY

RECEIVED
SEP 28 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5403

CURFEW DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

Please serve:

RICHARD L. CHAMBERS
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3390

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy
Attorney General

RICHARD L. CHAMBERS
Deputy Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

HARRISON KOHLER
Staff Assistant
Attorney General

I N D E X

Page

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 3

REASONS FOR NOT GRANTING THE WRIT

A. SUPPLEMENTATION OF A TRIAL TRANSCRIPT PURSUANT TO GA. CODE ANN. § 6-805(f), WHICH PROVIDES FOR NOTICE AND A HEARING, WHERE PETITIONER WAS REPRESENTED BY COUNSEL, DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS 7

B. THE RECORD REFLECTS THAT ONLY ONE JUROR WAS IMPROPERLY STRUCK FOR CAUSE, AND THE APPARENTLY ERRONEOUS EXCLUSION OF ONE JUROR FOR CAUSE BECAUSE OF THE JUROR'S CONSCIENTIOUS OPPOSITION TO CAPITAL PUNISHMENT DOES NOT REQUIRE A REVERSAL WHEN OTHER JURORS HAVING CONSCIENTIOUS OPPOSITION TO CAPITAL PUNISHMENT WERE NOT STRUCK FOR CAUSE 8

CONCLUSION 13

CERTIFICATE 14

TABLE OF AUTHORITIES

Page

Adams v. Washington, 76 Wash. 2d 650, 458 P. 2d 558 (1969), rev'd, 403 U.S. 947 (1971) 11

Bell v. Patterson, 402 F. 2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955 (1971) 12

Chessman v. Teets, 354 U.S. 156 (1957) 7

Coker v. State, 234 Ga. 555, 216 S.E. 2d 782 (1975) 7

Davis v. State, 236 Ga. 804, ___ S.E. 2d ___ (1976) 6

Harris v. Texas, 457 S.W. 2d 903 (Tex. Cr. App. 1970), rev'd 403 U.S. 946 (1971) 11

Marion v. Beto, 434 F. 2d 29 (5th Cir. 1970), cert. denied, 402 U.S. 906 (1971) 12

Miller v. State, ___ Ga. ___ (No. 31156, Sept. 8, 1976) 10

Owens v. State, 233 Ga. 869, 214 S.E. 2d 173 (1975) 7, 8

Ross v. State, 233 Ga. 361, 211 S.E. 2d 356 (1974) 7

Wigglesworth v. Ohio, 18 Ohio St. 2d 171, 248 N.E. 2d 607 (1969), rev'd, 403 U.S. 947 (1971) 11

Witherspoon v. Illinois, 391 U.S. 510 (1968). 9, 10 12, 13

STATUTES CITED

Page

Ga. Code Ann. § 6-805(f) 1, 7

III.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-5403

CURFEW DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1.

Did supplementation of a trial transcript pursuant to Ga. Code Ann. § 6-805(f), which provides for notice and a hearing, where Petitioner was represented by counsel, violate Petitioner's constitutional rights?

2.

Did the record reflect that only one juror was improperly struck for cause, and did the apparently erroneous exclusion of one juror for cause because of the juror's conscientious opposition to capital punishment require a reversal when other jurors having conscientious opposition to capital punishment were not struck for cause?

STATEMENT OF THE CASE

Petitioner Curfew Davis was indicted for murder by a Troup County, Georgia, grand jury. (R. 32-33).[1] He was tried in the Troup County Superior Court on November 11-12, 1974; and the jury found him guilty of murder. (T. 32). At the sentencing hearing the jury found that the murder was committed by a person with a prior record of conviction of a capital felony, the offense of murder was committed while Petitioner was engaged in another capital felony, and the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery of the victim. (R. 78). The death penalty was imposed. (R. 78-79).

Ms. Ann Starnes, the murder victim, was last seen alive on July 19, 1974, at approximately 1:30-2:00 p.m., when she picked up laboratory specimens in LaGrange, Georgia. (T. 46-47, 121-22).[2] On July 22, 1974, the Sheriff's Department of Muscogee County received a report that Ms. Starnes was missing. (T. 47-48). Her

---

[1] R. refers to the record prepared by the Superior Court Clerk.

[2] T. refers to the trial transcript.

abandoned 1973 Chevrolet was found in LaGrange on July 28, and Petitioner was arrested the following day. (T. 50, 53-54).

In his brief, Petitioner alleged that "[t]he only connection between the petitioner and the body was the petitioner's leading the officers to the body." (p. 3). That allegation is a gross misstatement of the evidence in the case.

Petitioner told a series of lies and contradictory stories to police. At first he claimed total innocence (T. 80); then he claimed to have obtained Ms. Starnes' car from a man in Atlanta (T. 80); next he admitted to stealing the car but claimed the keys had been left in the ignition (T. 81-82); his fourth version was that he stole Ms. Starnes' car while she was tied and gagged in the back seat (T. 133-135); and he finally admitted to being present when Ms. Starnes was beaten and murdered and to helping dispose of her body. (T. 136-138). Within these five different versions were numerous other contradictions.

Petitioner showed police the location of the car keys and the laboratory equipment that was in the car. (T. 81-83). The murder weapon (a pistol) belonged to

Petitioner's girlfriend, and Petitioner was living with her and had access to the pistol at the time of the murder. (T. 117, 156-58). Police were unable to discover any evidence supporting Petitioner's claim that other persons were involved in the kidnapping, robbery and murder. (T. 142).

Petitioner states in his brief that the remains of the badly decomposed body were "alleged to be the remains of Ann Starnes." (p. 2). The evidence proved conclusively that the victim was Ann Starnes. Her dentist, Dr. Joe Hawley, was able to identify her from the teeth that were found. (T. 100-01). Glasses were found by her body, and her opthamologist, Dr. John Newton, testified that the lens were the same prescription as that he had given to Ms. Starnes. (T. 102-03, 105-06). Two rings were also found at the scene; and Steve Morgan, a friend of Ms. Starnes, testified that the rings belonged to her. (T. 102-03, 108-09). Rebecca Hamburger, a lifelong friend of Ms. Starnes, identified torn clothing found at the scene as belonging to Ms. Starnes. (T. 124-25).

Petitioner put up no evidence at his trial, and the State proved beyond any reasonable doubt that he murdered Ann Starnes.[3] At the time he murdered Ms. Starnes, Petitioner was on parole from a life sentence that had been imposed for the offense of robbery by use of an offensive weapon. (T. 56-57, T. 183, Report of the Trial Judge, seventh unnumbered page). An examination of Ms. Starnes' body revealed that she had suffered severe fractures of her face and jaw bones, had been tied up with strips of her own clothing, and had been shot in the head. (T. 95-96).

On direct appeal, Petitioner's conviction and sentence were affirmed. See Davis v. State, 236 Ga. 804, ___ S.E. 2d ___ (1976).

None of Petitioner's allegations before this court concern the jury's finding that he was guilty of murder; rather he claims that the death sentence should be vacated and a life sentence imposed.

---

[3]Prior to this trial, Petitioner pled guilty to the motor vehicle theft of Ms. Starnes' car, but the State did not introduce the guilty plea into evidence until the sentencing phase of Petitioner's trial. (R. 82, T. 183).

REASONS FOR NOT GRANTING THE WRIT

A. SUPPLEMENTATION OF A TRIAL TRANSCRIPT PURSUANT TO GA. CODE ANN. § 6-805(f), WHICH PROVIDES FOR NOTICE AND A HEARING, WHERE PETITIONER WAS REPRESENTED BY COUNSEL, DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner was tried prior to the Georgia Supreme Court's decision of Owens v. State, 233 Ga. 869, 214 S.E. 2d 173 (1975). In Owens, a death sentence was vacated where the voir dire examination as it related to beliefs concerning capital punishment did not appear in the transcript that was originally transmitted to the Georgia Supreme Court, and where the court reporter was unable to supplement the record. Id. at 871.

Subsequent to the Owens decision, the State moved pursuant to Ga. Code Ann. § 6-805(f) to correct Petitioner's trial transcript. (R. 106). The motion was set down for a hearing, notice was given to Petitioner; and at the hearing of the motion Petitioner's counsel was present. (R. 107-08). The trial judge directed the court reporter to prepare the voir dire transcript regarding the questioning of the

prospective jurors who opposed capital punishment. (R. 109-09). Ga. Code Ann. § 6-805(f) may appropriately be used to supplement a trial record, Coker v. State, 234 Ga. 555, 216 S.E. 2d 782 (1975); and the Georgia Supreme Court may examine a voir dire transcript which has been prepared after the original record was forwarded from the superior court clerk to the Georgia Supreme Court. See Ross v. State, 233 Ga. 361, 368, 211 S.E. 2d 356 (1974). Owens v. State, supra, is not applicable to Petitioner's case, as Owens concerned a case in which a court reporter was unable to prepare a voir dire transcript.

Petitioner's reliance on Chessman v. Teets, 354 U.S. 156 (1957) is misplaced. In Chessman, this Court held that Chessman was entitled to be present or represented by counsel when his trial transcript was prepared. Petitioner's counsel was present at the hearing to correct and supplement the voir dire transcript.

B. THE RECORD REFLECTS THAT ONLY ONE JUROR WAS IMPROPERLY STRUCK FOR CAUSE, AND THE APPARENTLY ERRONEOUS EXCLUSION OF ONE JUROR FOR CAUSE BECAUSE OF THE JUROR'S CONSCIENTIOUS OPPOSITION TO CAPITAL PUNISHMENT DOES NOT REQUIRE A REVERSAL WHEN OTHER JURORS HAVING CONSCIENTIOUS OPPOSITION TO CAPITAL PUNISHMENT WERE NOT STRUCK FOR CAUSE.

There were eighty-three prospective jurors at Petitioner's trial. (R. 72-73). Fifty-four jurors were examined; and of these fifty-four, eleven were struck for cause, the State struck ten with its peremptory strikes, Petitioner struck twenty with his peremptory strikes, and one juror was excused without objection for other reasons. (R. 72).

Of the eleven jurors struck for cause, five were struck because of their opposition to capital punishment.[4] At the beginning of the voir dire the trial judge asked if any of the prospective jurors were conscientiously opposed to capital punishment. (T. 3). Petitioner's counsel

[4] Although Petitioner alleges juror Bankston was struck because of her opposition to capital punishment, Ms. Bankston stated that she had no objection to capital punishment. (T. 16).

objected to the question on the ground that such a question prevented Petitioner from having a fair and impartial jury. (T. 3). The District Attorney specifically referred to Witherspoon v. Illinois, 391 U.S. 510 (1968), and stated that a juror may properly be struck for cause if he would not impose a death sentence under any circumstances.

Witherspoon v. Illinois, 391 U.S. 510, 522-523 (1968) held that a potential juror cannot be excluded for cause simply because he has general reservations about the death penalty, but he may be excluded for cause if he will not impose the death penalty regardless of what transpires at the trial. Four of Petitioner's potential jurors were clearly disqualified under Witherspoon. Virgil Mathews Cotton was not willing to impose a death sentence under any circumstances. (T. 15). C. L. Gray would never vote to impose the death penalty, regardless of what the evidence was. (T. 18). Ledria Lucan would not vote to impose a death sentence even if the evidence warranted such a sentence. (T. 29-30). Mrs. Walter Meacham stated that she was opposed to capital punishment and would not vote for it. (T. 30).

Petitioner's attorney objected to their being struck for cause on the ground that these jurors could still be fair and impartial. (T. 4). However, if jurors who would not impose a death sentence under any circumstances were to remain on the jury, the State could never obtain a death sentence, even in an appropriate case. The Georgia Supreme Court has recently held that if there is a mistrial as to sentencing in a death case, the State cannot obtain a new trial as to sentencing, and the judge must impose a life sentence. Miller v. State, ____ Ga. ____ (No. 31156, Sept. 8, 1976).

The one prospective juror who was apparently struck for cause in violation of Witherspoon was Ruby Lamb. She stated that she was opposed to capital punishment, but apparently no inquiry was made to determine if she could set aside her personal feelings and impose a death sentence in an appropriate case. (T. 3). Marie McCann was not struck for cause because of her opposition to the death penalty when she stated she could impose a death sentence if the evidence warranted it. (T. 13). Mary Elizabeth Winston was not struck for cause because she said she could vote to impose the death penalty even though she did not believe in it. (T. 25).

The trial transcript reveals that of the group of three prospective jurors opposing capital punishment but able to impose it in an appropriate case, one juror was apparently erroneously excluded. Petitioner argues in his brief that where one juror is improperly excused, the death sentence must be vacated. (Page 13).[5] It is true that this Court has vacated death sentences where only one juror was improperly dismissed for cause because of general opposition to the death penalty. See Adams v. Washington, 76 Wash. 2d 650, 458 P. 2d 558 (1969), rev'd, 403 U.S. 947 (1971). Harris v. Texas, 457 S.W. 2d 903 (Tex. Cr. App. 1970), rev'd, 403 U.S. 946 (1971); Wigglesworth v. Ohio, 18 Ohio St. 2d 171, 248 N.E. 2d 607 (1969), rev'd, 403 U.S. 947 (1971). However, these cases are not in point. In Adams, supra; Harris, supra; and Wigglesworth, supra, one juror was excluded because of general opposition to the death penalty; but no jurors who had general opposition to the death penalty were left on the jury panel. Therefore, by

[5]Petitioner also alleged in his brief (pp. 11-12) that misleading remarks were made by the trial court and the district attorney during the voir dire. (T. 33). However, Petitioner made no objection or a motion for mistrial, and he did not enumerate these remarks as error in his direct appeal to the Georgia Supreme Court.

striking the one juror for cause, the trial court removed every person who had general reservations about the death penalty but could have imposed it in an appropriate case.

Witherspoon, supra, involved the exclusion of all forty-seven jurors who did not believe in the death penalty or who had conscientious or religious beliefs against it.[6] This Court stated, "[A] jury from which all such men have been excluded [emphasis added] cannot perform the task demanded it . . . . Culled of all who harbor doubts [emphasis added] about the wisdom of capital punishment . . . such a jury can speak only for a distinct and dwindling minority." Id. at 519-20.

The basis of Witherspoon was that there had been a systematic exclusion of all who opposed capital punishment, and by virtue of such a substantial element of society being eliminated, the jury failed to reflect a cross-section of the community. Bell v. Patterson, 402 F. 2d 394, 398-99 (10th Cir. 1968), cert. denied, 403 U.S. 955 (1971).[7] In Bell two jurors were improperly dismissed

[6]Only five jurors would not have imposed a death sentence under any circumstances. Id. at 514.

[7]In Marion v. Beto, 434 F. 2d 29 (5th Cir. 1970), cert. denied, 402 U.S. 906 (1971), the Fifth Circuit stated that the erroneous exclusion of one potential juror in violation of Witherspoon was reversible error. However, in Marion, three potential jurors were erroneously excluded because of general reservations concerning the death penalty, and the Fifth Circuit did not reach the issue as to whether the District Court correctly found that several jurors expressing reservations about the death penalty were not excused. Id. at 30-31.

in violation of Witherspoon, but other jurors conscientiously opposing the death penalty were not excused for cause.

At Petitioner's trial the State did not systematically exclude those who opposed capital punishment, the jury panel was represented by persons opposing capital punishment, and Petitioner's jury represented a fair cross-section of the community.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioner.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy Attorney General

RICHARD L. CHAMBERS
Deputy Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

HARRISON KOHLER
Staff Assistant
Attorney General

Please serve:

RICHARD L. CHAMBERS
132 State Judicial Bldg.
40 Capital Square, S.W.
Atlanta, Georgia 30334
(404) 656-3390

457 S.W. 2d 903 (Tex. Cr. App. 1970); Aiken v. Washington, 75 Wash. 2d 421, 452 P.2d 558 (1969) rev'd 403 U.S. 947 (1971); Adams v. Washington, 76 Wash. 2d 650, 458 P.2d 558 (1969) rev'd 403 U.S. 947 (1971); Mathis v. New Jersey, 52 N.J. 238, 245 A. 2d 20 (1968) rev'd 403 U.S. 946 (1971); Marion v. Beto, supra.

Nor does the fact that the state could have removed all death-scrupled veniremen by its peremptory strikes rectify the denial of petitioner's rights.[7] Speck v. Illinois, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968) rev'd 403 U.S. 946 (1971); Bernette v. Illinois, supra; Mathis v. New Jersey, supra; Wigglesworth v. Ohio, 18 Ohio St. 2d 171, 248 N.E. 2d 607 (1969) rev'd 403 U.S. 947 (1971); Whan v. Texas, supra.

The Court should therefore grant review here to decide whether veniremen who were excluded from the jury in petitioner's trial because of their scruples about the death penalty were eliminated in violation of the constitutionals rights to a fair and impartial jury and due process of law.

---

7 / Whether any of the three unexcused death-scrupled veniremen were included in petitioner's jury after the process of striking is impossible to discern from the record. (Appendix C, voir dire transcript)

III CERTIORARI SHOULD BE GRANTED BECAUSE THE INADEQUACY OF THE TRANSCRIPT INFRINGED UPON THE PETITIONER'S RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL AND DUE PROCESS OF LAW GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The necessity of an adequate and complete transcript of trial proceedings to the effective assistance of counsel is settled in both Georgia and Federal law. See Chessman v. Teets 354 U.S. 156 (1957); See Owens v. State 233 Ga. 869 (1975); Ga. Code Ann. §6-805(d) (1965).

Chessman dealt with the completion of an incomplete trial transcript following the death of the original court reporter. Mr. Justice Harlan speaking for the five members of the court[8/] held that the defendant was unconstitutionally denied representation at settlement conferences to complete the transcript despite a waiver of appointed counsel at the trial itself. Chessman at 162-163.

> "Under the cirsumstances which have been summarized, we must hold that the ex parte settlement of this state court record violated petitioner's constitutional right to procedural due process. We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel. (Cases cited) Id.,

The importance of a correct transcript under such circumstances had been recognized by California Statute in that the California Civil Procedure Code empowered the trial judge to set aside the judgment and order a new trial when death or disability of a court reporter made the making of a trial transcript impossible. Chessman n.3 at 158, n.9 at 162. Although this statute did not apply in criminal

---

8/

Mr. Justice Douglas dissented, joined by Mr. Justice Clark:

> "I agree with the general principle announced by the Court. But I think it is misapplied here."

Mr. Justice Burton dissented similarly and Chief Justice Warren did not participate in the decision. Chessman at 168.

cases, Justice Harlan suggested that California would logically place at least equal importance on transcripts in a criminal trial.[9/]

The Petitioner contends that this Court places a similar importance on the adequacy and completeness of a voir dire transcript where veniremen are admittedly excluded for scruples about the imposition of the death penalty. Clearly had the voir dire transcript in Witherspoon Boulden and Maxwell been inadequate for proper review, that in itself would have denied those defendants due process by preventing this Court from determining where specific abuses had occurred.

The Georgia Supreme Court should have found that the voir dire transcript and the Trial Court's Order amending it were constitutionally and statutorily deficient. That court ignored its own statutes and case law as well as Federal law in holding that the Davis trial transcript was adequate for review. (Opinion below, at 807) A careful examination for the voir dire transcript shows frequent and material deliberate omissions, as well as considerable confusion in the transcription. The entire voir dire (Transcript, 1-43) as well as the state's "Motion to Correct Transcript" (Record, 106), a pertinent affidavit from the defense attorney at trial and the Trial Court's Order amending the voir dire transcript (Record, 108-109) are

---

9/

> "...However, it is obvious that if the reporter's transcript is so important as to give the court such power in a civil case, a fortiori it must have such importance in a criminal case in which, on the evidence to be transcribed, the accused is sentenced to death. Likewise its importance is emphasized by the California law making the appeal automatic from death sentences. California Penal Code, §1239(b)". Chessman n.9 at 162.